Nos. 332 and 333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,
vs.
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

No. 333

UNION PACIFIC RAILROAD COMPANY, ET AL.,
Appellants,
vs.
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

BRIEF IN OPPOSITION TO APPELLANTS' MOTION TO REVERSE ON BEHALF OF THE NATIONAL LIVE STOCK PRODUCERS ASSOCIATION, AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION, COLORADO CATTLEMEN'S ASSOCIATION, IDAHO WOOL GROWERS ASSOCIATION, UTAH CATTLE AND HORSE GROWERS ASSOCIATION.

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September 14, 1955.

THE BLAKEMORE-WARREN PRINTING COMPANY, CHICAGO

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FOREWORD.

This brief is in opposition to a joint motion by appellants in Nos. 332 and 333 to reverse a final judgment of a three-Judge United States District Court for the District of Colorado without awaiting briefs, and oral argument. It is filed on behalf of the five above named livestock associations (hereinafter called appellees) more particularly described as follows:

The National Live Stock Producers Association, is a cooperative organization composed of over 500,000 live stock growers and feeders throughout the live stock producing areas of the country, and twenty-two cooperative live stock associations, with its principal offices at 139 North Clark Street, Chicago 2, Illinois.

The American National Cattlemen's Association, is a voluntary non-profit organization of live stock producers with principal membership in the seventeen States west of the Missouri River, also in the States of Florida, Louisiana, Oklahoma and elsewhere, with executive office and postoffice address 515 Cooper Building, Denver, Colorado.

The Colorado Cattlemen's Association, is a non-profit association organized under the laws of the State of Colorado, with offices at 4651 Lafayette Street, Denver, Colorado; it is composed of 48 local associations throughout the State of Colorado, comprising approximately 5,000 members, many of whom have cattle ranching operations contiguous to The Denver and Rio Grande Western Railroad.

The Idaho Wool Growers Association, is a voluntary non-profit organization in the State of Idaho, with executive office and postoffice address 17 Broadbent Building, P. O. Box 2598, Boise, Idaho.

The Utah Cattle & Horse Growers Association, is a voluntary, non-profit organization composed of twenty local associations and numerous individuals totaling approximately 2,000 members in the State of Utah with executive office and postoffice address at Heber, Utah.

These appellees have an important and pecuniary interest in the issues involved in the above entitled proceeding and they and their members are engaged in the production, buying, selling and shipping of live stock within, to, and from the area involved in this proceeding and that they pay and bear the charges for the transportation of such live stock.

The appellees herein were intervening complainants before the Interstate Commerce Commission (hereinafter referred to as the Commission) in *The Denver and Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.*, 287 I. C. C. 611, decided January 12, 1953.

That proceeding was brought because of the failure and refusal of the U. P. to establish just, reasonable and nondiscriminatory competitive joint through rates and charges in connection with the Rio Grande via its Colorado and Utah gateways in violation of Section 1 (4), Section 3, and Section 15 (1), (3), and (4) of the Act as amended:

> (1) between (a) points on or via the U. P. in Utah north of Ogden, Idaho, Montana, Oregon, Washington, and British Columbia, Canada, and
> (b) Colorado common points and points east thereof; and
>
> (2) between Utah common points and same northwest territory specified in (1) (a) above.

Appellees also submitted brief and participated in oral argument on appeal before the District Court for the District of Colorado in *The Denver and Rio Grande Western*

Railroad Company v. *United States of America and Interstate Commerce Commission*, Civil Action No. 4492.

The Commission granted only partial relief to live stock producers and feeders. The Commission's order, herein, provided in part that the defendants and the complainant according as they participate in the transportation, be, "* * * required to establish * * * and thereafter maintain through routes via Ogden and Salt Lake City, Utah, in connection with the line of the complainant for the interstate transportation of various named commodities, in carloads, including ordinary live stock, from origins in the territory north and west of Ogden to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming."

Thus the majority decision of the Commission denied relief to and from the important live stock market at Denver and the other Colorado common points and including the eastern part of Colorado, all of the State of Kansas, Nebraska, South Dakota, North Dakota, Minnesota, Wisconsin, northern part of Iowa and Illinois, and the upper peninsula of Michigan.

Appellees contend that, to the extent indicated, the

order of the Commission herein referred to is unlawful, arbitrary, capricious and contrary to the evidence of record and the provisions of the Interstate Commerce Act, in that it failed to find and to prescribe in the public interest the same relief to the restricted territory above described that it accorded to the territory to which relief was granted.

The District Court held that the order of the Interstate Commerce Commission is invalid and unlawful insofar as it denied relief, prayed for by the plaintiff and the intervening plaintiffs and ordered that the same be annulled and set aside insofar as it denied relief to the plaintiff and intervening plaintiffs and remanded the matter to the Interstate Commerce Commission for further proceedings in conformity with the opinion and judgment of the District Court.

Appellants in No. 332 and No. 333 appealed to this Court from the final judgment and decree of the District Court below.

Subsequently appellants have filed a joint motion before this Court to reverse the judgment of the District Court without awaiting briefs and oral argument.

ARGUMENT.

Appellants' motion to reverse is without support of any rule of this Court and is repugnant to their respective statements as to jurisdiction on appeal to this Court.

Under identically worded headings appellants declare that "the questions are substantial."

The appellants in No. 332 list ten questions beginning on page three of their jurisdictional statement. Appellants in No. 333 beginning on page seven of their statement of jurisdiction list fourteen separate questions presented by their appeal, and on page twenty-seven state that the questions presented have a far-reaching future effect not only upon the railroads generally * * * and upon the public * * * but also in the field of judicial review of the Commission's orders, especially the through routes provision of Section 15(3) and (4).

The appellees herein agree that the questions presented are substantial and are of vital interest and concern to the live stock producers, their Associations and others, but contend that the number and nature of the many questions presented by appellants undeniably refute their motion to reverse the decision and judgment of the District Court without brief and oral arguments.

It should be noted that the decision of the Commission corrected only in part an unlawful rate adjustment of long standing that has discriminated against live stock producers and others. We contend that the action of the Commission should not be restricted to only a partial correction of an unlawful rate adjustment.

The Act contemplates that there should be no excluded territory with respect to any commodity or persons.

The District Court properly found that the Commission erred as a matter of law in reaching the conclusion that upon consideration of undisputed facts such through routes are not in existence.

1. Movants' first contention is that the District Court was without jurisdiction to consider the complaint, because the action complained of is not in conformity with the order. The movants contend that the Urgent Deficiencies Act confers no jurisdiction upon the courts to review "matter embodied in a (Commission) report and not followed by a formal order," *United States* v. *Atlanta B. & C. R. Co.*, 282 U. S. 522, 528; and state that that Act clearly makes the existence and presence of an "order" embodying the matter complained of pre-requisite to jurisdiction to review and that there is no such order here.

This is a wholly unwarranted contention and contrary to the view of the Supreme Court in *Mitchell* v. *United States*, 313 U. S. 80. Notwithstanding that no order was entered, the Court held that the Commission erred in refusing and in failing to find that the treatment accorded Mitchell by the railroads constituted an unjust discrimination and an undue prejudice in violation of the Interstate Commerce Act. The Supreme Court having reversed the decision of the Commission remanded it with directions, whereupon the Commission reconsidered its original decision and upon reconsideration in *Mitchell* v. *Chicago, R. I. & P. Ry. Co.*, 248 I. C. C. 149, found that Mitchell had suffered undue prejudice in violation of the Interstate Commerce Act.

Furthermore in a later decision, in *Henderson* v. *United States*, 339 U. S. 816, this Court held that the complainant was entitled to removal of the undue discrimination notwithstanding the fact that the Commission found that the modified rules did not violate the Interstate Commerce Act and that no order for the future was necessary.

We believe it is also significant to point out that the Commission in its order of January 12, 1953 said in part:

> "This proceeding being at issue upon complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof * * *."

This clearly shows that the Commission made its report in the case below a part of the order issued thereon. Obviously, in view of the holdings of this Court and the action of the Commission, the above contention of the movants is wholly untenable.

2. In connection with second contention in support of movants' motion, we wish to point out that in addition to the interests of the Rio Grande, the interests of live stock producers and other shippers, and the public interest are entitled to careful consideration.

The decision of the Commission corrected only in part an unlawful rate adjustment that has discriminated against live stock producers and other shippers.

The District Court annulled and set aside the order of the Commission insofar as it denied relief to complainants.

We submit that the facts shown in the record in this proceeding justify the complete relief from discriminatory rates as was held by this Court in the *Mitchell* and *Henderson* cases, *supra*, on the ground that the Act contemplates that there should be no excluded territory with respect to any commodity or persons.

Therefore movants' second contention above referred to is without merit.

3. Movants' third contention that the District Court in reversing the Commission's finding that the through routes via Ogden and Salt Lake are not in existence within the meaning of the Act, misconstrued or refused to be guided by this Court's decision in *Thompson* v. *U. S.*, 343 U. S. 549.

The decision in the *Thompson* case is not applicable here. In that case, the United States Supreme Court held that the Commission's efforts to support its finding that a through route from Lenora, Kansas, to Omaha via the Burlington Line already exists are inconsistent with the meaning of the term "through route" as used in the Interstate Commerce Act. Since there was admittedly no evidence that the Missouri Pacific ever offered through transportation over the route in question the Commission's order was wholly without evidentiary support under the accepted tests for the determining of an existence of a through route. In defining a through route the Supreme Court stated "In short, the test of the existence of a through route is whether the participating carriers hold themselves out as offering through transportation service. *Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.*" (Italics supplied.)

In this case, the route is open, applicable rates are in effect, but they are unjust, unreasonable, and unduly prejudicial, and discriminatory rates, being composed of combinations or arbitraries in addition to rates based on a mileage scale. All this means that the route can be used, the evidence shows it has been used, but subject to a penalty of paying excessive rates and charges. In view of this the limitations of Section 15(4) do not apply.

However, the provisions of Section 15(3) are definitely applicable. The pertinent part thereof reads as follows:

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, * * * and joint rates. * * *"

It should be noted that the Commission may prescribe joint rates and through routes if either or both are necessary or desirable in the public interest. *Stickell Case*, 255 I. C. C. 333, 338; *Cancellation of Rates and Routes*, 245 I. C. C. 183, and *Inland Waterway Case*, 151 I. C. C. 126.

We believe that the decision of the United States Supreme Court in *Virginian Railway* v. *U. S.*, 272 U. S. 658 (referred to in the *Thompson* case, *supra*), is also applicable here. In that case, it was stated that the route in question was commercially closed because the carriers had not established any joint rates and that only a combination of local rates was applicable that resulted in charges so high as to be prohibitive. The Commission there found that the combination rate was both unreasonable and discriminatory and prescribed through rates which it found were reasonable and non-discriminatory. The order was made under Section 1 and Section 3, and we contend that relief under these same sections of the Act is justified in this case without any territorial limitations.

Movants also cited *U. S.* v. *Great Northern R. Co.*, 343 U. S. 562, and quoted a single sentence from page 575 in support of their contention that the District Court misconstrued or refused to be guided by the principles in that case.

The quotation below includes the first sentence quoted by movants and the remaining part of the paragraph and all of the following paragraph as follows:

"Congress amended Sec. 15(4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs. But the provisions

of Sec. 15(4)—the restrictions against short hauling, the financial needs prohibition and the emergency route provision—all deal with the Commission's power to establish through routes.

"Congress could well have prohibited the Commission from considering financial needs in issuing any order under Sec. 15 (3). This was proposed in one bill and expressly rejected by a congressional committee. Or, Congress could have prohibited consideration of financial needs in ordering establishment of joint through routes where through routes were in existence, as was also proposed. Instead, Congress adopted a provision prohibiting reliance on financial needs only in respect to orders establishing through routes. It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written. Where, as here, the Commission did not establish through routes, Sec. 15 (4) has no application."

Furthermore, in the course of the oral argument before the Interstate Commerce Commission on October 16, 1952, Mr. Collins, Counsel of the Union Pacific, in answer to a question by Chairman Alldredge as to whether the routes via the Rio Grande were closed, said:

"No, I don't think so, if they want to pay more, if they want to route via the Rio Grande and pay the price."

From the above it is evident that the movants and not the District Court misconstrued or refused to recognize the true significance of the above cases cited by them.

4. Now we come to movants' fourth and last contention in support of their motion to reverse (page 19 of motion to reverse). This is nothing more than an attempt to make a play on words. The phrase, referred to by movants must in all fairness to the Court be construed in the light of the entire opinion or so much of it as is necessary to give the phrase the application it is intended to have.

The more pertinent part of the opinion is as follows:

"We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding.

The undisputed evidence bearing upon the crucial question of existing through routes must be summarized. In 1897, the Union Pacific established joint through competitive rates with the Rio Grande to and from points in the northwest area through Ogden. These rates were in effect until canceled by Union Pacific in 1906 from and to some points and in 1912 from and to remaining points. But the through routes were not closed.

Counsel for Union Pacific expressed the opinion at the hearing before the Commission, in response to interrogation by Chairman Alldredge, that the cancellation of the joint rates did not close the through routes and that shippers were free to route via the Rio Grande if they wanted to pay more.

The principal traffic witness of the Union Pacific testified at the hearing that a shipper who was willing to pay the higher combination rate had the right to specify under Sec. 15(8) of the Act a route via the Rio Grande. It should be observed that this right exists only when through routes and through rates have been established. This witness further testified that some joint through rates are now published in a Union Pacific tariff for application to shipments of sheep and goats from the northwest area via Ogden and the Rio Grande to points on the Missouri River and east thereof.

A continuous use of the Rio Grande route in the movement of traffic to and from the closed door area at

through combination rates, without objection of the Union Pacific or participating railroads, is shown by the evidence, although the volume of traffic involved is comparatively small, etc."

The opinion is 29 pages long and after the part above quoted the opinion continued for about seventeen more pages ending with a last paragraph as follows:

> "The order insofar as it denied relief to the Rio Grande will be annulled and set aside and the cause remanded to the Commission for further proceedings in conformity with this opinion."

It is therefore clearly apparent that phrase referred to by movants does not contravene the final conclusion of the District Court.

CONCLUSION.

In consideration of the above comments and in view of the importance and the far-reaching nature of the issues involved, appellees respectfully urge that the appellants' joint motion to reverse be denied and that the matter be given consideration in accordance with the regular procedure of this Court.

Respectfully submitted,

LEE J. QUASEY,
Counsel for Appellees Herein.

PROOF OF SERVICE.

I, Lee J. Quasey, Counsel of record for appellees herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of September, 1955, I served, on behalf of the appellees herein named copies of the foregoing brief, in opposition to appellants' motion to reverse on the several parties, by mailing a copy in a duly addressed envelope with airmail postage prepaid, as follows:

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